

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 8:08-cr-00330-T-30TBM

JOHN ROBERT MILLER

MOTION OF COAST BANK BORROWERS FOR
RECOGNITION AS CRIME VICTIMS

COME NOW, Richard Ainsworth, Louise I. Ainsworth, and Claudia Ainsworth (hereinafter collectively referred to as “the Ainsworths”), by and through undersigned counsel, and, pursuant to 18 U.S.C. §3771 (hereinafter, “The Crime Victims’ rights Act” or “the Act” or “the CVRA”), respectfully move this Court for an order recognizing and establishing the Ainsworths as victims of the offense to which Defendant, John Robert Miller (hereinafter, “Defendant” or “Miller”) has pled guilty, and in support thereof would state:

FACTS

1. On September 18, 2008, during hearing before this Honorable Court, Defendant pled guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, as provided for in the plea agreement executed by Miller on August 7, 2008 (hereinafter, “the Plea Agreement”).
2. Pursuant to the Plea Agreement, Miller essentially admitted to conspiring with a Coast Bank vice president, Philip Coon (hereinafter, “Coon”) to charge various Coast Bank borrowers, including the Ainsworths, *an extra point* on each of their Coast Bank mortgage loans and to then split the extra point with Coon.

3. Paragraph J.1 of the Ainsworths' Coast Bank Construction Loan Agreement, which was utilized for their loan from Coast Bank, reads in pertinent part:

“[t]he Borrower shall pay, or provide payment for all costs of the closing of the Loan and all expenses incurred by the Lender with respect thereto, including, but not limited to...loan fees....”

4. Copies of the Ainsworths' Construction Loan Agreements are attached hereto as Composite Exhibit A.
5. Moreover, Coast Bank required the Ainsworths to executed a form entitled, “Borrower's Authorization of Closing Funds,” which on its face indicates that closing costs were to be paid from the loan proceeds. Copies of the Ainsworths' “Borrower's Authorization[s] of Closing Funds” are attached hereto as Composite Exhibit B.
6. Furthermore, the HUD-1 Settlement Statements associated with the Ainsworths' transactions reflect that closing costs, including the loan origination fee (i.e. the “points” charged), were paid out of the loan proceeds. Attached as Composite Exhibit C are copies of the Ainsworths' HUD-1 Settlement Statements.
7. Specifically, the HUD-1 Settlement Statement related to the transaction involving Richard Ainsworth and Louise Ainsworth clearly demonstrates that the extra percentage point was collected as part of the \$8,370.00 loan origination fee. A similar fee was charged and collected in relation to the transaction involving Claudia Ainsworth.
8. As a direct result of Miller's conspiracy, the Ainsworths each became obligated to repay Coast Bank and its successor, First Bank of Missouri, thousands of dollars more than they would have otherwise had to repay.
9. The extra point skimmed by Coon and Miller reduced the amount remaining in the loan for construction of the home and lot which was the subject of the transactions. As a

result, Enchanted Homes, the builder, constructed a home in a completely unworkmanlike manner and the home is consequently completely unmarketable, and would be even in the best market conditions.

10. Each of the Ainsworths have also become obligated to pay interest on the extra point skimmed by Coon and Miller, further exacerbating the injury the Ainsworths have sustained as a result of the conspiracy perpetrated by Coon and Miller.
11. The Ainsworths therefore seek and respectfully request recognition as victims entitled to the rights afforded victims under the Act, and specifically establishing that they are accordingly entitled to, *inter alia*:
 - a. Notice of all public proceedings regarding this offense;
 - b. The right to attend all hearings regarding the offense;
 - c. The right to be heard at any plea or sentencing of the offense;
 - d. The right to reasonably confer with the government regarding the case;
 - e. The right to full and timely restitution; and
 - f. The right to be treated with fairness and with respect for their dignity and privacy.
12. As part of one example, as part of exercising their rights, Richard Ainsworth and Louise Ainsworth would seek \$4,185 (the amount of the extra point skimmed by Coon and Miller), plus interest charged on this amount, in restitution from Coon and Miller. Claudia Ainsworth would seek similar restitution.
13. The Ainsworths could each provide sworn evidence to demonstrate the foregoing in the event this Honorable Court believes such evidence is required to reach and appropriate decision on whether the Ainsworths should be recognized as victims of the conspiracy under the Act.

WHEREFORE, the Ainsworths respectfully request that the Court will enter an order recognizing and establishing the Ainsworths as victims of the offense under the CVRA.

MEMORANDUM OF LAW

The CVRA provides a broad array of rights to “crime victims,” as that term is defined in the Act. For instance, crime victims are entitled to notice of all public proceedings regarding the offense, the right to attend all hearings regarding the offense, the right to be reasonably heard at any plea or sentencing of the offense, the right to reasonably confer with the Government regarding the case, the right to full and timely restitution, and the right to be treated fairly and with respect to dignity and privacy. 18 U.S.C. § 3771(a). As more fully discussed below, the definition of the term “crime victim” is intentionally broad. Furthermore, the Ainsworths squarely fall within such definition. As a result, the Ainsworths are entitled to be recognized and established as crime victims of the Defendant’s crime under the Act.

a. The Broad Definition of “Crime Victim”

The Ainsworths are asserting their under the Act. The CVRA “was designed to be a ‘broad and encompassing’ statutory victims’ bill of rights.” United States v. Degenhardt, 405 F.Supp.2d 1341, 1342 (D. Utah 2005) (quoting 150 Cong. Rec. S4261 (daily ed. April. 22, 2004) (statement of Sen. Feinstein)). In the course of construing the CVRA generously, the Ninth Circuit observed: “[t]he criminal justice system has long functions on the assumption that crime victims should behave like good Victorian children – seen but not heard. The [Act] sought to change this by making victims independent participants in the criminal justice process.” Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011, 1013 (9th Cir. 2006). Accordingly, because the Act is remedial legislation, court should interpret it “liberally to facilitate and accomplish its

purposes and intent.” Elliott Industries Ltd. Partnership v. BP American Production Co., 407 F.3d 1091, 1118 (10th Cir. 2005).

Moreover, not only must the Act be interpreted liberally in its entirety, but the definition of “crime victim” must be given a generous construction. The term “crime victim” means, under the Act., those “directly and proximately harmed as the result of the commission of a federal offense....” 18 U.S.C. § 3551(3). After reciting such definition, one of the Acts’ co-sponsors, Senator Kyl, explained that “[t]his is an intentionally broad definition because all victims of crime deserve to have their rights protected....” 150 Cong. Rec.S10912 (Oct. 9, 2004). Because such statement was made during the course of a floor colloquy, such explanation must be given significant weight. See Kenna, 435 F.3d at 1015-1016 (discussing the importance of the Act’s sponsors’ floor statements). Accordingly, the definition of “crime victims” must be construed broadly in favor of the Ainsworths.

b. The Ainsworths are Crime Victims under the Act

As discussed *supra*, the definition of “crime victim” under the Act is those persons “directly and proximately harmed as a result” of the defendant’s crime. 18 U.S.C. § 3771(e). The law is clear that one is directly and proximately harmed as a result of the defendant’s crime when, but for the defendant’s crime, the person would not have been harmed and the causal nexus is not extremely attenuated. See United States v. Donaby, 349 F.3d 1046 (7th Cir. 2003); United States v. Vaknin, 112 F.3d 579, 589 (1st Cir. 1997); United States v. Checora, 175 F.3d 782, 795 (10th Cir. 1992); United States v. Hackett, 311 F.3d 989, 992-993 (9th Cir. 2002)¹.

In the case *sub judice*, the Ainsworths have clearly been damaged because they are now responsible to pay for an extra percentage point which was split by Coon and Miller.

¹ Each of the referenced cases involves other statutes protecting crime victims’ rights having language of direct and proximate harm as part of its definition of “crime victim.”

Furthermore, it is clear that such harm is the direct result of Coon and Miller's conspiracy because, but-for such conspiracy, the Ainsworths would not have such responsibility. Because the extra percentage point charged, skimmed, and split by Coon and Miller was the very object of their conspiracy, it is clear the causal connection between the conspiracy and the harm the Ainsworths suffered as a result thereof is not attenuated. Accordingly, the Ainsworths are "crime victims" under the Act and are entitled to be recognized as such and to be accorded the rights afforded them thereunder.

CONCLUSION

WHEREFORE, the Ainsworths respectfully request that the Court will enter an order recognizing and establishing the Ainsworths as victims of the offense under the CVRA.

Dated: January 20, 2009

Respectfully submitted,

By: s/David J. Plante

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing on January 20, 2009, with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to Rachelle DesVaux Bedke, Assistant United States Attorney (rachelle.bedke@usdoj.gov); Eduard A. Suarez, Esquire, counsel for Miller (esuarez@suarezlawfirm.com); James E. Felman, Esquire, Kynes, Markman, and Felman, P.A., counsel for Coon (jfelman@kmf-law.com).

s/ David J. Plante
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